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summary judgment under Rule 56”)). The Board likewise informed the parties that it would consider the government’s statement of facts to be a statement of undisputed material facts under Board Rule 7(c)(1)¹ and that, pursuant to FED. R. CIV. P. 12(d), both parties would “be given a reasonable opportunity to present all the material that is pertinent to the motion.”

On June 24, 2024, appellant filed its supplemental brief, titled “appellant’s opposition to the government’s motion for summary judgment” (app. sur-reply), and on July 31, 2024, the government filed its supplemental brief, titled “government’s response to appellant’s opposition to the government’s motion for summary judgment” (gov’t sur-reply). Included with the government’s response were two exhibits: Exhibit A, Declaration of Scott C. Rogers, Sales Contracting Officer (SCO), and Exhibit B, selected documents setting forth selected bid information submitted by BRG and five other companies who responded to the invitation for bids (IFB). Noting that the government’s filing included the above-referenced declaration and additional documents, by Order dated August 5, 2024, the Board informed the parties that appellant had the option of filing a brief in reply to the government’s response, should it so choose. On August 26, 2024, appellant filed its reply, titled “appellants response to government response to the opposition to the government’s motion for summary judgment” (app. sur-sur-reply).

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

IFB for Disposition Services

1. On June 11, 2021,² DLA Disposition Services issued IFB No. 39-1001 for disposition services and sale of scrap metal and residue from other mutilated commodities in Kuwait (R4, tab 1 at 1).³

2. The IFB set June 28, 2021, as the closing date for submission of sealed bids and specified that “a single award will be made to a single responsive and responsible bidder who bids the highest cumulative price for all seven (7) Items” (*id.* at 1, 6).

¹ BRG’s response in opposition to the government’s motion contained no direct response to the government’s statement of fact consisting of 35 numbered paragraphs (*see* gov’t mot. at 3-15, app. opp’n at 3-9).

² The IFB is undated, however, the government’s Rule 4 index assigns a document date of June 11, 2021.

³ Documents in the government’s Rule 4 file and supplement are stamped with Bates numbers beginning with zeros. We cite to these Bates numbers but omit the initial unnecessary zeros.

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Bidders were required to submit a “unit bid price” in pounds for the following items: mixed metals, brass, copper, rubber, textile, electronic residue, and plastic (*id.* at 7). The IFB included estimated quantities for bid evaluation purposes (*id.* at 6). The IFB offered a 12-month term with options for a potential contract period of no more than 60 months (*id.*).

3. IFB Paragraph I.12, “Notice of Material Breach,” provided that in the event of a material breach or default, the party asserting the material breach (either the purchaser or the agency) “shall serve written notice upon the party that committed or is alleged in the notice to have committed such material breach” (R4, tab 1 at 22). Paragraph I.13 provided that the breaching party may cure the material breach within 14 days of notice (the cure period) or a longer period if set by the non-breaching party (*id.*).

4. IFB Paragraph I.14, “Termination,” specified that termination shall be effective upon written notice by the non-breaching party to the breaching party and that the parties “shall continue to perform their respective duties under the contract during the phase-out and wind down periods, as needed” (*id.*).

5. IFB Paragraph I.15, “Agency Remedies for Material Breach by Purchaser,” set forth actions against the purchaser that the government may take “to satisfy its claims for any non-payments or other damages,” including presenting a claim against the purchaser, seeking monetary damages, or asserting “any other right, claim, or remedy available pursuant to the Contract Disputes Act of 1978 [CDA] (41 U.S.C. [§§] 7101-7109) including termination for cause/default” (*id.*).

6. IFB Paragraph N.12, “No Reimbursements,” stated, in part:

This is not a service contract administered in accordance with the FAR. This is a contract for the sale of scrap pursuant to provision in Title 40, U.S.C., Chapter 7. The Government is not responsible for any indirect or inconsequential expenses related to performance under this contract. The measure of the Government’s liability, in any case where liability of the Government to the Purchaser has been established, shall not exceed refund of such portion of the purchase price as the Government may have received.

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All property covered under this contract is being sold as is, where is, with no warranty or guarantee of use or salability expressed or implied. No request for adjustment in price for any item or rescission of the sale will be considered.

(R4, tab 1 at 28)

The IFB and the DLA Disposition Services Pamphlet

7. The IFB incorporated by reference certain portions of the July 2012 DLA Disposition Services pamphlet titled “Sale By Reference [SBR] Instructions, Terms and Conditions Applicable to Department of Defense (DoD) Personal Property Offered for Sale by DLA Disposition Services” (R4, tab 1 at 11-12, tab 3 at 1). Portions specifically incorporated included SBR Part 2, titled “Sale of Government Property General Sale Terms and Conditions,” and SBR Part 4, titled “Sale of Government Property Special Sealed – Term Conditions” (*id.* at 11-12) (*see also* R4, tab 2 at 22-23 (SBR PART 4 referencing “STANDARD FORM 114C REVISED 4/2001 PRESCRIBED BY GSA FPMR (41 CFR) 101-45.3”))).⁴

8. The IFB stated that a responsive bid shall contain the offeror’s “proof of registration” with Joint Contracting and Contingency Services (JCCS) (R4, tab 1 at 6, tab 13).⁵ The IFB required the successful offeror to provide DLA a specified prepayment amount, which the government would retain until completion of the contract closure period (R4, tab 1 at 16). SBR Part 4, Paragraph 2, set the prepayment amount at 20% of “the estimated total price for one year’s removal of property” (R4, tab 2 at 22) (*see* R4, tab 1 at 11 (incorporating specific SBR paragraph by reference)).

9. SBR Part 2, Paragraph 9, “DEFAULT,” provided that a purchaser’s failure to make required payments to the government was considered a breach, whereby:

⁴ 41 C.F.R. Part 101-45 “SALE, ABANDONMENT, OR DESTRUCTION OF PERSONAL PROPERTY” includes Subpart 101-45.3, “Sale of Personal Property,” which states “[f]or information on the sale of personal property previously contained in this part, see FMR part 38 (41 CFR part 102-38).” Part 102-38 “SALE OF PERSONAL PROPERTY” sets forth “the policies governing the sale of Federal personal property.”

⁵ The government states, “JCCS is an acronym for ‘Joint Contingency Contracting System’” (gov’t mot. at 5 n.2). JCCS is accessible at www.jccs.gov (R4, tab 3 at 6).

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the Government may send the Purchaser a 15-day written notice of default (calculated from date of notification), and upon Purchaser's failure to cure such default within that period . . . the Purchaser shall lose all right, title, and interest which he/she might otherwise have acquired in and to such property as to which a default has occurred.

(R4, tab 2 at 8-9) (*see* R4, tab 1 at 11 (incorporating specific SBR paragraph by reference))

10. SBR Part 2, Paragraph 31, "GUARANTEED DESCRIPTIONS," provided, with certain restrictions, that "the Government guarantees to the original Purchaser that the property will be as described in the Sales offering . . ." (R4, tab 2 at 17) (*see* R4, tab 1 at 11 (incorporating specific SBR paragraph by reference)). Paragraph 31(c) provided that, if after removal, the contracting officer (CO) determined the property contained a misdescription, upon timely notice by the purchaser, the government would accept return of the misdescribed property for a refund of any money received (R4, tab 2 at 18).

11. SBR Part 2, Paragraph 31(d) provided, in part:

The Purchaser is not entitled to any payment for loss of profits or any other monetary damages, special, direct, indirect, or consequential. Recovery of any kind against the Government under this provision is limited to a refund of the purchase price of the material found to have been misdescribed.

(*Id.*)

12. SBR Part 4, Paragraph 6, "TERMINATION," stated, "[u]nless otherwise provided in the Sale, this contract may be terminated by either party without cost to the Government upon 30 days' written notice to the other, to be calculated from the date the notice is mailed" (R4, tab 2 at 23) (*see* R4, tab 1 at 12 (incorporating specific SBR paragraph by reference)).

13. The SBR included "TIPS FOR BIDDERS," which stated, in part: "[a]lways verify your unit price and your total price before submitting the bid. Mistakes can prove costly to you and will delay processing your bid. Initial the erasures and changes made on your bid." (R4, tab 2 at 49)

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Screening and Assessment of Apparent High Bidder (AHB)

14. The IFB instructed that “[t]he bidder with the highest cumulative average will be considered the apparent high bidder and will be vetted prior to award” (R4, tab 1 at 7). IFB Paragraph D.8, “Screening and Assessment of Apparent High Bidder,” provided that as part of the responsibility determination, the agency will conduct a pre-award assessment of only the AHB (R4, tab 1 at 14).

BRG Bid Submission

15. BRG timely submitted its pricing proposal and other required submissions on June 28, 2021 (R4, tab 3 at 3-5). BRG’s bid was submitted via email by Samuel Rico (*id.* at 5). For Item No. 3, Copper, BRG bid \$3.11100 per pound (R4, tab 1 at 7, tab 3 at 5). Copper prices submitted by other offerors included bids of \$2.90000, \$2.51610, \$2.44800, \$2.38900, and \$2.38000 (R4, tab 69 at 5; gov’t sur-reply, Decl. of Scott C. Rogers ¶ 15).

16. By email dated July 26, 2021, Mr. Rogers, the SCO, requested BRG “[p]lease confirm your bid...Are the bids, per Item No., accurate?” (R4, tab 3 at 1) (ellipsis in original). The SCO’s email to BRG included on its face a list of BRG’s unit price bids for all seven items, including item 3 - \$3.11100 (copper) (*id.*) (*see* May 22, 2024, email to Board (transmitting gov’t reply and submitting as attachment native version of SCO’s July 26, 2021, email)). The SCO’s email also requested BRG provide additional information required by JCCS and “complete the required questionnaire” (R4, tab 1 at 6, tab 3 at 1).

Contract Award

17. By email dated September 30, 2021, the government notified BRG of contract award and directed it to “remit one payment of \$608,580.71 USD . . . within 5 business days” (R4 tab 4 at 4). The email also cautioned that although the contract has been awarded, “removals” were not permitted until payment was received (*id.*).

Late Payments

18. After contract award, BRG did not make timely payment of the prepayment amount and other amounts required by the contract (R4, tab 6 at 2, tab 11 at 2-3, tab 17 at 1-2).

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19. By email dated November 30, 2021, the government notified BRG of its concerns regarding timely payment and BRG's failure to obtain base access within 60 days, stating:

Both of these items are grounds for immediate termination for failure to perform, specifically nonpayment and failure to obtain base access. Bottom line our site at Kuwait is severely impacted and removals need to happen. I need to know can you perform the contract? If you can't that is fine, we can move to mutually agree to terminate and return the \$250K prepayment.

(R4, tab 18 at 1)

20. By email dated December 10, 2021, the government provided BRG with a Notice of Default (R4, tab 19 at 1). The notice stated that the government had received \$300,000 from BRG and set a deadline of December 31, 2021, for BRG to cure the default by providing an additional \$308,580.71 USD (the balance owed the government) and obtaining base access (R4, tab 20 at 1). The Notice of Default also provided:

Please note that under the terms of the contract, either party has the right to terminate the contract, without regard to cause, upon 30 days' notice to the other party, SBR part 4 para 6. Please consider this the Government's notice to terminate the contract for default, or under Bilateral Mutual agreement between both parties in accordance with 48 CFR 43.103 (b)(1) if you cannot cure the default and commence performance within 30 days.

(*Id.*)

21. It is not disputed that BRG subsequently completed its contractual pre-payment requirements, and accordingly, the parties held a start-of-work meeting on January 12, 2022 (R4, tab 21 at 1).

Contract Performance

22. In February and March 2022, BRG requested renegotiation of the price of copper it was paying under the contract (R4, tab 22 at 3, tab 23 at 2). The government informed BRG that renegotiation of the copper price was not an option but explained

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to BRG the process by which it could question discrepancies regarding the materials it received (R4, tab 22 at 1, tab 23 at 2, tab 24 at 1).

23. BRG submitted Reports of Discrepancy (“ROD”) alleging misdescription or discrepancies of certain materials received, including claims of excessive debris (R4, tabs 24-25, 33, 36-39, 82 (account adjustment records)). In response to these RODs, BRG received excess debris and dunnage credits of more than \$375,000 over the course of the contract (R4, tab 82). In section 12 of the ROD - setting forth justification for the credits - the government stated, “[c]redit for approximately 30% of weight specified for excess dunnage and debris. No credit for alleged misdescribed property. Property issued and removed as photographed is in accordance with material typically sourced to SCL D4D as described in IFB 39-1001.” (R4, tab 82 at 2, 4, 6)

BRG’s Continued Deficiencies in Making Contract Payments

24. By letter dated April 14, 2022, the government again notified BRG that it was in default based upon an unpaid balance of \$945,154.59 for scrap received pursuant to the contract (R4, tab 40). By email dated April 14, 2022, BRG informed the government it would submit payments of \$250,000 per week until the balance due was completely paid (R4, tab 43 at 1).

25. By email dated April 19, 2022, the government informed BRG that the current balance owed was \$864,627.40, based upon its total bill of \$1,725,860.24, minus a wire transfer by BRG to the government of \$481,527.19, and a credit due BRG of \$379,705.65 (R4, tab 42 at 1).

26. BRG made additional periodic payments for scrap received from the government (R4, tab 47 at 1), but by mid-June 2022, BRG had accumulated an unpaid balance of \$1,850,333.26 (R4, tab 56 at 1).

Contract Termination

27. By letter dated June 28, 2022, the government notified BRG that it was in default based upon an unpaid balance of \$1,611,609.25 (R4, tab 57 at 1). The government advised BRG that “failure to cure this default by July 31, 2022, will result in your contract being terminated, without further notice” (*id.*).

28. In response to the government’s June 28, 2022, letter, BRG made partial payments and promised to make more “as soon as we can” (R4, tab 60 at 4).

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29. By email dated August 16, 2022, the SCO transmitted to BRG a letter dated August 15, 2022, terminating the contract “for failure to pay” (R4, tab 61 at 3). The letter stated:

The USG will be seeking to recover funds that USG believes it is still owed. Based off bills, credit adjustments and payments received as of 7/28/2022, the amount still owed, is \$1,386,860.67. I acknowledge the fact that BR Group has made some additional payments since 7/28 but the SCO has not been able to confirm those payments have been received by the USG.

(R4, tab 61 at 3) The SCO advised BRG that the letter was a final decision of the CO and advised BRG of its appeal rights pursuant to the CDA (*id.*).

30. By email dated September 4, 2022, BRG acknowledged termination of its contract, stating “[w]e have discovered evidence which shall prove to solve this matter through Alternative Dispute Resolution [ADR]” and requested that the government communicate only with BRG’s attorney (R4, tab 62). By email dated September 19, 2022, the government agreed to communicate only with BRG’s attorney (R4, tab 63).

BRG’s Request for Reconsideration of Contract Termination and ADR

31. By letter dated September 29, 2022, appellant’s attorney requested the SCO reconsider the “termination for default of payment and we submit this matter to ADR, as prescribed in the Federal Acquisition Regulations (FAR) 33.214 Alternative Dispute Resolution” (R4, tab 64 at 2). BRG’s attorney stated, for the first time, that BRG’s proposal submitted in response to the IFB contained a mistake in bid regarding the price of copper, alleging “the amounts stated in your letter of termination, in particular the cooper [sic] cables and foreign material, are based on a pricing mistake that should have been discovered by the Contracting Officer, at time of BID, or corrected after award of contract” (*id.*). BRG’s September 29, 2022, letter also stated that “[t]his equitable adjustment will not in any way harm the US Government and in fact will prevent waste of time and money to force the Contractor to Appeal the decision to the Armed Services Board of Contract Appeals,” and requested “that the Government, DLA organize the ADR as per FAR 33.201” (R4, tab 64 at 3-4).

32. BRG alleged that the price for copper on the subject contract was much higher than the price BRG paid for copper on another DLA contract:

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The pricing of Qatar for the same exact material, and essentially the same contract, is 0.53790 per pound for Copper and Foreign Material, whereas the same material is a mistake of price of \$3.1111 three dollars and eleven cents per pound, a clear and convincing mistake in the original bid pricing for this category.

(R4, tab 64 at 3)

33. BRG requested “that the contract be reformed with the corrected price, and equitable adjustments made [sic] the total quantity of Copper and Foreign Material Category according to the attached spreadsheet” (*id.*) (citing Attachment C Spreadsheet Qatar Vs. Kuwait Copper) (*see also* R4, tab 64 at 1) (email listing attachments “Exhibit C COPPER KUWAIT VS QATAAR.xlsx”), 11-12 (referenced spreadsheet). Attachment C included two spreadsheets, one listing each of BRG’s copper purchases at \$3.111 per pound (the amount BRG Group paid for copper under the current contract) and the other spreadsheet listing each of BRG’s copper purchases, but at a price \$0.53790 per pound (the amount BRG paid for copper under its Qatar contract) (R4, tab 64 at 11-12). Below the second spreadsheet was the following statement: “OVERCHARGED \$2,214,759.80 QATAR VS KUWAIT PRICING” (*id.* at 12 (capitalization in original)).

34. BRG’s September 29, 2022, letter did not request payment in a sum certain amount, nor was it certified as a claim (R4, tab 64 at 2-4). BRG’s letter stated that its “nonpayment of the outstanding invoices is excusable and the mistake in pricing for the category of Copper Wire and Foreign Attachments must be corrected and the Contract removed from default status with the corrected prices” (*id.* at 4). BRG’s letter made no mention of why BRG failed to discover the alleged bid mistake during the contract performance period (*id.* at 2-4).

35. By email dated September 30, 2022, the SCO acknowledged receipt of BRG’s September 29, 2022, letter, and requested additional information regarding BRG’s mistake in bid claim, as required by FAR 14.407-4(e)(1) (for mistakes disclosed after award CO shall request contractor to support alleged mistake in bid by submission additional evidence). The SCO informed BRG that the government “will look to recover \$773,960.89 plus interest, penalties and fees (IPA) of \$24,756.46” (R4, tab 67 at 1-2). By email the same day, appellant’s counsel responded to the SCO’s request for additional information, stating that the documentation sought was already in the possession of the government and that “[a]s to the amount owed, we are asking for an equitable adjustment based on the mistake in the copper pricing and for the

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contract to be reinstated” (*id.*). BRG provided no additional specific information as to the actual amount BRG intended to bid for copper or the nature of the mistake.

36. By email dated October 6, 2022, the SCO responded to BRG’s September 30, 2022, email, asking BRG whether “by referring to BR Group's Qatar IFB are you asserting BR Group intended to bid the exact same price as it did on the Qatar IFB?” (R4, tab 66 at 1). The SCO encouraged BRG to provide any additional relevant information (*id.*).

37. By email dated October 11, 2022, to the SCO, BRG’s attorney reiterated appellant’s general position regarding an alleged mistake in bid but did not respond directly to the government’s request that BRG provide internal documentation evidencing the existence of an actual mistake or establishing the amount BRG intended to bid. BRG’s attorney likewise did not respond to the government’s question whether BR Group was asserting it intended to bid the same price it did for copper on the Qatar contract (R4, tab 67 at 4-5). Instead, BRG asserted that “[e]ven if the pricing for Kuwait is not solely based on Qatar pricing for the copper cables, the amount of \$3.11 is still more than twice the market prices in Kuwait, Qatar, and the international market” (R4, tab 67 at 5).

Final Decision Regarding BRG’s Mistake in Bid Claim

38. On October 19, 2022, the SCO issued a final decision. In an email accompanying the letter, the SCO stated that it was a “response to your Alternative Dispute Resolution (ADR) dated 9/29/2022.” The final decision letter treated BRG’s September 29, 2022 letter as a mistake in bid claim. The final decision does not address BRG’s request for reconsideration of the default termination. The SCO provided BRG notice of appeal rights (R4, tab 69 at 3, 7).

The SCO rejected BRG’s claim, stating:

BR Group’s mistake in bid claim fails because there was not evidence putting the SCO on notice of an alleged mistake, nor did the contractor advise me of a mistake until after the contract was terminated for default. However, even if there was sufficient evidence to provide constructive notice, a reformation of the bid price still would not be warranted because 1) there is no evidence of how/why the mistake occurred; and 2) no evidence of what the bid price was intended to be, as is required to reform a bid price on a competitively awarded contract. You

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provided no bid sheets, work statements, or any explanation of how the mistake occurred or what type of mistake it was - the closest I can surmise is that you are suggesting BR Group intended to bid \$0.53, rather than \$3.11, because that's what their bid was in Qatar. But there is no documentary evidence to support such a contention or explain why \$3.11 was bid if the intent was actually to be \$0.53.

(R4, tab 69 at 7)

39. The SCO also noted that under the competitively-awarded contract, reformation “would be unfair to all the other bidders whose price would have been higher” and that “[i]n this case, if BR Group’s bid on item 3 were revised to \$0.53 as it bid in Qatar, it would have been ranked 13th among the responsive bidders and would have not been in line to receive award” (*id.*).

BRG’s Notice of Appeal (ASBCA No. 63507)

40. On January 16, 2023, appellant filed a notice appealing to the Board the SCO’s October 19, 2022, final decision denying appellant’s September 29, 2022, mistake in bid claim and request for contract reinstatement (R4, tab 85). BRG asserted in its notice of appeal:

The dispute concerns:

A mistake in bid price of the contract created a financial hardship to the Contractor when the which the [sic] CO has [sic] rejected the request for an equitable adjustment and for an alternative dispute negotiations at the request of the Contractor on October 19, 2022. (Attached Final Decision of Contracting Officer).

The amount in dispute is \$2,214,760.00 United States Dollars (Two Million Two Hundred and Fourteen Thousand and Seven Hundred and Sixty Dollars) plus the interest applied, plus attorney fees and reinstatement of the contract under number in the State of Kuwait.

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(*Id.*)⁶ On February 27, 2023, BRG filed an untitled document (which BRG apparently intended to be its complaint in ASBCA No. 63507). That document does not directly challenge the basis of the government’s termination for default. Instead, BRG asserts its claim of mistake in bid, but does not set forth the specific amount of relief sought (app. untitled document dtd. February 27, 2023).

BRG’s March 15, 2023, Certified Claim

41. BRG submitted to the SCO a certified claim dated March 15, 2023, in the amount of \$738,500, “the amount overpaid for the cooper [sic] wiring due to mistake in the pricing at time of bid” (R4, tab 86 at 1). The amount requested by appellant reflects the difference between BRG’s bid price for copper, \$3.11100 per pound, and the next highest bidder for copper, \$2.90000 (which the SCO had set forth in the October 19, 2022, final decision) (R4, tabs 6 at 4-5, 69 at 5), each multiplied by the full estimated contract quantity for copper of 3,500,000 pounds (R4, tab 1 at 7 (IFB section A.3, term titled “All or None Bidding”)), computed as follows: 3.11100 x 3,500,000, which equals \$10,888,500, and 2.90000 x 3,500,000, which equals \$8,312,885 (R4, tab 69 at 4), representing a difference of \$738,500.

Government Files Motion to Dismiss Regarding September 29, 2022, Claim

42. On April 14, 2023, the government filed a motion to dismiss BRG’s January 16, 2023, appeal of its September 29, 2022, claim, alleging that BRG’s claim did not set forth a sum certain amount and that any monetary relief it sought was not certified.

BRG’s Final Payment of Monies Owed the Government

43. By letter to the ASBCA dated August 11, 2023, the government confirmed “that BR Group has paid all amounts owed on its now-terminated Kuwait scrap contract, No. 4000890446, and there is no debt related to that contract that would form the basis for an affirmative claim by the Government” (Joint Status Report dtd. August 11, 2023, at 1).

BRG’s Notice of Appeal (ASBCA No. 63744)

44. On October 21, 2023, appellant filed a notice with the Board appealing the contracting officer’s deemed denial of appellant’s March 15, 2023, claim. BRG stated:

⁶ The government’s answer asserts that BRG did not submit to the contracting officer a claim in the amount of \$2,214,760.

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the dispute concerns:

A mistake in bid price of the contract created a financial hardship to the Contractor when the which the [sic] CO has [sic] rejected the request for an equitable adjustment and for an alternative dispute negotiation at the request of the Contractor on October 19, 2022. (Attached Final Decision of CO).

(App. Notice of Appeal dtd. October 5, 2023, at 2).

45. On November 28, 2023, the parties held a telephone status conference with the Board to discuss the government's April 14, 2023, motion to dismiss. The government agreed that, given BRG's deemed-denial appeal of its March 15, 2023, claim, it was not necessary for the parties to continue briefing the government's April 14, 2023, motion to dismiss and, accordingly, the Board issued an Order considering the motion withdrawn, subject to reinstatement (Memorandum of Conference Call and Order, dtd. November 28, 2023).

46. On December 12, 2023, BRG submitted to the Board a document in the format of a brief (which BRG apparently intended to be its complaint in ASBCA No. 63744), in which BRG does not directly challenge the basis of the government's termination for default, instead asserting its claim of mistake in bid (app. untitled document dtd. November 15, 2023).⁷ Instead, BRG stated that after submission of its March 15, 2023, claim, BRG "made a business decision to accept the mutual mistake burden and made a reduction in the copper wiring price to align with the alleged second highest bidder" (app. untitled document dtd. December 12, 2023, at 5). BRG's December 12, 2023, submission also sought "the expected benefits of the contract and the copper details and the financial damages that the Appellant has

⁷ On November 15, 2023, appellant submitted to the Board this same document, which the Recorder's Office docketed as a brief. During the conference call on November 28, 2023, in which the parties discussed the government's then-pending April 14, 2023, motion to dismiss (and during which the motion to dismiss was withdrawn), the Board discussed whether BRG intended the November 15, 2023, submission to be a motion for summary judgment and ultimately ordered BRG to submit its complaint in ASBCA No. 63744 no later than December 28, 2023 (Memorandum of Conference Call and Order, dtd. November 28, 2023). BRG then filed its December 12, 2023, submission, which the government in its February 12, 2024, motion to dismiss, treated as one version of BRG's complaint.

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endured,” which included, based upon BRG’s computations, “Profit @25% per year: \$2.8m,” and “Profit x 3years = 2.8m x 3 years + \$8.4m” (*id.* at 12).

47. Pursuant to the Board’s Orders dated January 8, 2024, and January 9, 2024, which together required BRG submit a revised, numbered complaint, on January 12, 2024, BRG submitted another document - still in the format of a brief - which appellant apparently intended to be a complaint (app. untitled document dtd. January 12, 2024). In that document, BRG again does not directly challenge the basis of the government’s termination for default, instead asserting its claim of mistake in bid. BRG’s submission included the same calculations regarding profit and alleged entitlement to reimbursement for “overall project details,” including 25% profit anticipated per year of \$2.8 million per year, totaling \$8.4 million for three years, and expenses (yard, equipment, staff) for eight months, totaling \$438,356 (*id.* at 20). Neither request was asserted in BRG’s March 15, 2023, claim (R4, tab 86).

48. BRG’s January 12, 2024, submission also included a revised damages amount for “Actual Loss Copper” of \$964,584.80, which allegedly represented the “Total DLA Paid Bill: \$2,677,749.70” minus “Total Sales Copper: \$1,713,165” (app. untitled document dtd. January 12, 2024, at 20).

SCO Declaration Dated July 30, 2024

49. The SCO stated in his declaration:

As noted in my final decision found at Tab 69 of the Rule 4 file in this case, my review of the bid prices did not indicate any potential mistake in BR Group’s bid as the bid had no errors on its face, the unit and extended line-item pricing matched perfectly, and it was right in the range of other competitive offers. Because I did not have reason to believe a mistake was made, I did not request bid verification under FAR 14.407-1. I did, however, ask BR Group to confirm its bid, as is my customary practice. See tab 3 of the Rule 4 file. I did not review BR Group, or any other contractor’s pricing on the Qatar IFB, or any of our other Gulf States offerings on which many of our scrap vendors bid.

(Gov’t sur-reply, Decl. of Scott C. Rogers ¶ 12)

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50. The SCO also stated in his declaration:

even if BR Group had produced evidence of a mistake in bid and what it's [sic] intended bid was, which it has not, it would not be entitled to price reformation because just modifying the copper price to change it to its Qatar price (even leaving all their other line items at its higher Kuwait price) would have dropped their price rank to 13th and they would not have been in line for award. Thus, rescission would have been the only option.

(Gov't sur-reply, Decl. of Scott C. Rogers ¶ 16)

DECISION

I. BRG's Mistake in Bid Claim - Contentions of the Parties

BRG alleges that its contract to purchase FEPP "in the form of scrap at Camp Arifjan, Kuwait[,] was terminated due to the mistake in bid for the Copper Tubing and foreign material which the DLA CO knew or should have known was a material fact in the over inflated price which resulted in invoices that could not be sustained by the removed FEPP" (app. opp'n at 2). The government argues that appellant's September 29, 2022, letter alleging a mistake in bid and requesting ADR to negotiate a price reformation, "was submitted approximately 45 days after its scrap purchase contract was terminated for non-payment and did not assert that the termination was wrongful, but instead stated that its non-payment should be excused due to the 'mistake in bid' its attorney had discovered" (gov't mot. at 2). Regarding the alleged mistake in bid, the government notes appellant's allegation that the mistake "was not 'discovered' until after its contract was terminated" and that appellant "has fail[ed] to plead or allege facts sufficient that, if true, would establish the necessary elements of each theory that forms the basis for such claims" (gov't mot. at 3).

II. The Government is Entitled to Summary Judgment on Appellant's Mistake in Bid Claim

Standard of Review

As noted above, the government's motion to dismiss for failure to state a claim is being treated as one for summary judgment. It is well established that "[s]ummary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *First Com. Corp. v. United*

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States, 335 F.3d 1373, 1379 (Fed. Cir. 2003); FED. R. CIV. P. 56(a). The government, as the moving party, “bears the burden of establishing the absence of any genuine issue of material fact . . .” *Bubble Room, Inc. v. United States*, 159 F.3d 553, 561 (Fed. Cir. 1998). In challenging the government’s motion, BRG “must set forth specific facts showing that there is a genuine issue for trial.” *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968). To establish a genuine issue of material fact, BRG must present sufficient evidence upon which this Board could decide in its favor after “drawing the requisite inferences and applying the applicable evidentiary standard.” *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1541 (Fed. Cir. 1993). Mere conclusory statements are inadequate. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

Burden of Proof

To recover for an alleged mistake in bidding, BRG must establish that:

- (1) a mistake in fact occurred prior to contract award;
- (2) the mistake was a clear-cut, clerical or mathematical error or a misreading of the specifications and not a judgmental error;
- (3) prior to award the Government knew, or should have known, that a mistake had been made and, therefore, should have requested bid verification;
- (4) the Government did not request bid verification or its request for bid verification was inadequate; and
- (5) proof of the intended bid is established.

McClure Elec. Constructors, Inc. v. Dalton, 132 F.3d 709, 711 (Fed. Cir. 1997) (quoting *Solar Foam Insulation*, ASBCA No. 46921, 94-2 BCA ¶ 26,901 at 133,954).

To prevail, BRG must demonstrate that it meets all five elements. *Zafer Constr. Co.*, ASBCA No. 56769, 17-1 BCA ¶ 36,776 at 178,231, *aff’d*, *Zafer Constr. Co. v. U.S. Army Corps of Eng’rs*, 753 Fed. Appx. 909 (Fed. Cir. 2019) (mem), *cert. denied*, 140 S. Ct. 502 (2019) (contractor failed to point to any evidence “that would demonstrate that the assumptions and calculations underlying its proposal were, in fact, mistaken”). Evidence of the mistake and the price BRG intended to bid must be established by clear and convincing evidence. *United States v. Hamilton Enters., Inc.*, 711 F.2d 1038, 1046 (Fed. Cir. 1983).

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BRG Alleges its Mistake in Bid was Committed by an Unnamed Accounting Team and was Discovered Only After Contract Termination – Factors (1), (2) and (5)

BRG alleges in its response to the government’s motion that the mistake in bid “was done by an accounting team, who left the company shortly thereafter, and thus the discovery of the mistake was not made until the BR Group sought legal counsel” (app. opp’n at 1). BRG’s response also states that “[t]he mistake in the bid was made by a manager of BR Group, who left the company shortly after, and thus the mistake was undiscoverable to the Operations Manager Sam Rico, who was not involved in the bids” (app. opp’n at 4).⁸ As to the timing of the alleged discovery, BRG states that “[o]n September 29, 2022,⁹ after full investigation of all the pricing and working with the new accountant at BR Group to ascertain the reason why BR Group was consistently losing money on a contract,” BRG “asked for ADR to avoid wasting valuable time” (app. opp’n at 8) (citing R4, tab 64).

The government argues that BRG’s January 12, 2024, filing “makes it apparent that the price reformation it seeks is not based on any fact, evidence or circumstance that existed at the time it submitted its bid which might satisfy the element of ‘what it actually intended to bid,’” rather, BRG “seeks to negotiate its price down to that of its nearest competitor, despite the fact that the price of its nearest competitor was not, and could not have been, known to it at the time it submitted its bid” (gov’t mot. at 14-15) (citing app. untitled document dtd. January 12, 2024, at 11).

BRG has the burden of establishing that its alleged pre-award mistake was a clear-cut, clerical, mathematical error, or a misreading of the specifications, and not an error in judgment. Regarding the person who allegedly made the error, BRG’s counsel states only that the error was made by an unnamed, former accountant or manager who is no longer employed by appellant. Regarding the circumstances surrounding the alleged mistake in bid, BRG provides no specificity as to the alleged error. In support of its position that “[t]he mistake was a clerical in nature,” BRG states, “it is unclear how the accountant came up with the \$3.11 a pound when BR Group was performing the same exact contract in Qatar at \$0.53 cents a pound. And unfortunately, the

⁸ Although BRG asserts that Mr. Rico “was not involved in the bids,” BRG states that Mr. Rico, as Chief of Operations, submitted the bid (app. sur-sur-reply at 6) (see SOF ¶ 15).

⁹ The SCO terminated the contract over a month earlier via email dated August 16, 2022, “for failure to pay” (SOF ¶ 29).

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accountant left BR Group.” (App. sur-reply at 5)¹⁰ BRG’s admission that “it is unclear how the accountant came up with the \$3.11 a pound” in no way establishes that BRG’s unnamed accountant made an alleged clear-cut, clerical mistake, or a misreading of the specifications, nor does it establish that the alleged error was not a mistake in judgment.

BRG also argues that “[a]ppellant is already performing the same exact contract in Qatar, and it is the duty of the CO to have pointed out that they have a massive variance for Category 3, the Copper Tubing” (*id.*). From this, BRG summarily concludes that “[t]his mistake was a ‘clear-cut clerical error.’ Therefore, the second element is satisfied” (*id.*). Other than argument of counsel, however, BRG offers no support for its proposition that a mistake in bid occurred prior to award. BRG’s bald assertions of counsel are a wholly insufficient basis upon which to find that appellant has met its burden of establishing the existence of a genuine issue of material fact regarding its alleged mistake in bid. *Zafer Constr. Co.*, 17-1 BCA ¶ 36,776 at 178,231 (“Counsel’s unsupported argument is not proof”); *Betance Enters., Inc.*, ASBCA No. 63076 *et al.*, 23-1 BCA ¶ 38,273 at 185,841 (appellant’s allegations supported only by argument of counsel are “insufficient to ‘warrant a full exposition of the facts at trial of this appeal’”); *ECC Int’l LCC*, ASBCA Nos. 61176, 62029, 21-1 BCA ¶ 37,824 at 183,692 (appellant’s counsel “simply saying it does not make it so”).

Appellant has failed to meet its burden of alleging facts sufficient to support a finding that “a mistake in fact occurred prior to contract award” or that “the mistake was a clear-cut, clerical or mathematical error or a misreading of the specifications and not a judgmental error.” *McClure Elec. Constructors*, 132 F.3d at 711; *Logistics Data Rsch. Corp.*, ASBCA No. 43737, 94-3 BCA ¶ 27,240 at 135,736 (reformation based upon mistake in bid denied where contractor did not “offer either first hand testimony or its bid work sheets to establish what the mistake was”). BRG likewise has failed to meet its burden of alleging facts sufficient to support a finding regarding proof of its *intended* bid. *McClure Elec. Constructors*, 132 F.3d at 711. As noted by the government, “none of BR Group’s pleadings affirmatively state a ‘unit price’ it intended to bid; instead it uses the delta between its copper price and its competitor’s at the full estimated quantity used for evaluation purposes as a statement of its

¹⁰ In its sur-sur-reply, BRG alleges, without documentary support, that “[t]he accountant, a third country national, created the spreadsheets with both KG and Pounds, and made a mistake with the Copper tubing category with the conversion, or a typo graphical error, a mistake is a mistake” (app. sur-sur-reply at 1). BRG’s speculation of counsel that the mistake was due to a conversion or typographical error is likewise an insufficient basis upon which to find the existence of a genuine issue of material fact.

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damages” (gov’t mot. at 15). BRG argues that “[t]he intended pricing was clearly the same pricing that was being used in the Qatar contract, but without the accountant that prepared the spreadsheets to submit with the bid, the lawyer could not interview him” and that BRG “conceded to a mutual mistake in the bid for the scrap materials because the accounting team that did the spreadsheets for the proposal were no longer with the company at the time of discovery” (app. opp’n at 9).¹¹ Again, BRG offers nothing other than argument of counsel in support of its assertion.

In its sur-sur-reply, appellant states that “[t]he managers of BR Group have not been deposed or given the opportunity to voice their side of the story and the time of discovery of the mistake in bid” and that appellant “has attempted to find and obtain the affidavit of the accountant, but to no avail” (app. sur-sur-reply at 2). BRG’s failure to “find and obtain the affidavit of the accountant” is not a sufficient basis upon which to determine that there exists a genuine issue of material fact regarding the alleged mistake in bid made by the still-unidentified accountant. As the party with the burden of proof, it is appellant’s responsibility, not the government’s, to produce evidence such as a declaration or affidavit supporting appellant’s basic factual predicate. *Barmag Barmer Maschinefabrik Ag v. Murata Machinery Ltd.*, 731 F.2d 831, 835-36 (Fed. Cir. 1984) (“party opposing the motion must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant. Mere denials or conclusory statements are insufficient.”); *McClure Elec. Constructors*, 132 F.3d at 711 (appellant has burden to establish unilateral mistake).

Summary judgment in favor of the government is appropriate here as the evidence offered by BRG is insufficient to establish the existence of a genuine issue of material fact regarding BRG’s alleged mistake in bid. *Office Automation & Training Consultants*, ASBCA Nos. 56779, 56838, 11-1 BCA ¶ 34,666 at 170,768, *aff’d in relevant part on recon.*, 12-1 BCA ¶ 34,887 (“If, on the record before us on the

¹¹ In its submissions to the Board, BRG maintains, without record support, that its intended price for copper was the same as the price it paid under its Qatar contract - \$0.53 cents a pound (app. sur-reply at 27, 30). However, appellant also states that “in the interest of maintaining the relationship with DLA[, BRG] made concessions to the pricing after obtaining bids in the market in Kuwait and reduced the amount in their Certified Claim of March 15, 2023, plus interest” (*id.* at 7), and “in the interest of finalizing the mistake in bid and not go into prolonged and costly legal process, [BRG] made concessions by reducing the amount to the [sic] give the Government the benefit of the doubt of the mistake in bid and time of discovery to the variance between the next highest bidder only on the copper tubing (*id.* at 30).

motion, [the non-moving party] has failed to come forward with evidence sufficient to place into dispute material facts as to any one or more of these elements, the government's motion for summary judgment may appropriately be granted"). BRG has failed to present sufficient evidence upon which a reasonable factfinder could find the existence of a mistake in bid or that appellant has established a genuine issue of material fact regarding whether its bid contained such a mistake.

BRG alleges the SCO Knew or Should Have Known About Mistake in Bid Prior to Award – Factors (3) and (4)

As noted above, to recover for an alleged mistake in bidding, BRG must demonstrate that it meets all five elements or factors, and as discussed above, BRG has failed to present sufficient evidence upon which a reasonable factfinder could find the existence of a genuine issue of material fact regarding factors (1), (2), and (5). As we discuss below, the same is true regarding factors (3) and (4).

"It is undisputed that the government has a general duty to examine bids for mistakes." *Giesler v. United States*, 232 F.3d 864, 872 (Fed. Cir. 2000) (citing FAR 14.407-1). Indeed, "the government must examine bids for 'obvious' clerical errors" and "other errors, such as discrepancies between the contractor's bid and the bids of other contractors or the government's estimate." *Id.* (citing FAR 14.407-2 and FAR 14.407-3). BRG argues that pursuant to FAR 14.407-3(g), a contracting officer is required to request bid verification prior to award where there is a suspected or alleged mistake in bid and that "verification request must be detailed enough to put the contractor on notice of the specific mistake suspected by the contracting officer" (app. opp'n at 10). In its sur-reply, appellant alleges that the SCO "had actual and or constructive knowledge of the mistake in the bid and the SCO attempted to obtain the Appellant[']s acknowledgement of the mistake in the bid for the Copper tubing and other foreign materials, but his request failed to specifically point out the mistake that he knew or should have known was a mistake in bid" (app. sur-reply at 1).

Notwithstanding appellant's assertion to the contrary, the fact that the SCO requested BRG *confirm* its bid does not establish that the SCO believed BRG's bid contained a mistake. Pursuant to the IFB, "[t]he bidder with the highest cumulative average [would] be considered the apparent high bidder and . . . vetted prior to award," which included the government conducting "a pre-award assessment of only the AHB [Apparent High Bidder]" (SOF ¶ 14). As part of that process, the SCO, by email dated July 26, 2021, requested that BRG "[p]lease confirm your bid. . . Are the bids, per Item No., accurate?" and that BRG provide additional information required by JCCS, as well as complete a required questionnaire. (SOF ¶ 16)

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To the extent appellant *infers* that the SCO knew appellant's bid included a mistake because he requested BRG confirm its bid, the SCO's declaration submitted by the government with its sur-reply brief establishes that he was unaware of any mistake in bid and had no "reason to believe a mistake was made" (SOF ¶ 49). Specifically, the SCO's declaration states that his "review of the bid prices did not indicate any potential mistake in BR Group's bid as the bid had no errors on its face, the unit and extended line-item pricing matched perfectly, and it was right in the range of other competitive offers" (*id.*). Indeed, regarding the price of copper, five other offerors submitted bids within the range of appellant's bid for that item (SOF ¶ 15). Accordingly, the SCO "did not request bid verification under FAR 14.407-1" (SOF ¶ 49).¹² Rather, the SCO asked BRG "to confirm its bid" as was his "customary practice" (*id.*). In its sur-sur-reply, appellant objects to the SCO's statement in his declaration, arguing that appellant was not "given a chance to depose the SCO" (app. sur-sur-reply at 2). However, neither in its sur-sur-reply nor by separate motion does BRG request such discovery.

FED. R. CIV. P. 56(d) sets forth the legal standard for a non-moving party opposing summary judgment to request additional discovery. It is not enough for the non-moving party to simply assert that discovery is incomplete. Rather, the party "must establish by affidavit or declaration the reason or reasons why it is unable to file an affidavit presenting the facts necessary to oppose the motion," and "identify the facts not available, the steps the party has taken to obtain these facts, and must show how additional time will allow the party to rebut the pending motion." *Globe Trailer Mfg., Inc.*, ASBCA 62594, 21-1 BCA ¶ 37,973 at 184,421 (citing *Odyssey Int'l, Inc.*, ASBCA Nos. 62062, 62279, 21-1 BCA ¶ 37,902 at 184,070). Counsel's statement that BRG has not deposed the SCO in no way meets the legal standard set forth in FED. R. CIV. P. 56(d) or this Board's precedent for requesting or granting discovery. BRG's sur-sur-reply offers no contravening record evidence upon which this Board could find a genuine issue of material fact regarding whether the SCO was aware of appellant's alleged mistake in bid.

As noted by the government, during the contract performance period, BRG officials undoubtedly were aware of the price difference in copper between the two contracts, as they "engaged in discussions with various government personnel about addressing their losses by renegotiating the price, rather than correcting a mistake in their bid of the type contemplated by FAR 14.407" (gov't reply at 20) (*see* SOF ¶ 22). To the extent BRG argues that the SCO should have known about the alleged mistake in bid prior to contract award, appellant fails to explain why none of its employees

¹² We note that the SBR alerted all bidders to the importance of verifying unit prices before submitting bids (SOF ¶ 13).

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discovered the alleged mistake at any time during contract performance or why discovery of the alleged mistake (ultimately by its attorney) did not occur until after contract termination. It strains logic to suggest that throughout the contract performance period, BRG employees remained unaware of an alleged mistake in bid price for copper (based upon the price differential between its contracts in Kuwait and Qatar), and only became aware after contract termination once its attorney conducted a review. To conclude, as appellant suggests, requires a leap in logic we are not prepared to take.

BRG cites the Court of Federal Claims decision in *CTA Inc. v. United States*, 44 Fed. Cl. 684, 695 (1999), for the proposition that “the most common situation putting the CO on notice of a possible error is a significant disparity between a favorable bid and the bids of others” (app. opp’n at 11). That decision does not help appellant’s cause. Indeed, in *CTA*, the court found that although “there was disparity between plaintiff’s bid and the government estimate,” as well as “between the bid price and the cost of prior procurements of the same item,” and that “the government had actual knowledge of the disparities,” the court held that “the circumstances as a whole as they were known at the time demonstrate that the government was not on notice that a mistake had been made.” *Id.*

Appellant has failed to present sufficient evidence upon which a reasonable factfinder could find a genuine issue of material fact that the SCO knew or should have known BRG had submitted a mistake in bid or that the SCO’s request that BRG confirm its bid was somehow inappropriate or inadequate. Appellant, who has the burden of proof, has proffered only argument of counsel and no record evidence that the SCO had actual knowledge of the alleged mistake in bid. Likewise, appellant has proffered no record evidence that the SCO had constructive knowledge of the alleged mistake in bid. We reject BRG’s attempt to fault the SCO for not noticing an alleged mistake in bid that appellant states it was unaware of during contract performance and was discovered by its attorney only after contract termination.

BRG Alleges the SCO was Required to Correct the Alleged Mistake After Award

BRG cites FAR 14.407-4, “Mistakes after award,” as support for its allegation that the SCO had a duty after contract award to correct the alleged mistake in bid. FAR 14.407-4 states “[i]f a contractor’s discovery and request for correction of a mistake in bid is not made until after the award, it shall be processed under the

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procedures of Subpart 33,” Disputes and Appeals.¹³ FAR 14.407-4(a) allows the government to correct a mistake not discovered until after award “by contract modification if correcting the mistake would be favorable to the Government without changing the essential requirements of the specifications.” FAR 14.407-4(b) authorizes agencies to rescind a contract or reform a contract, *i.e.*, “(i) [t]o delete the items involved in the mistake; or (ii) [t]o increase the price if the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original invitation for bids.” FAR 14.407-4(c) requires determinations be made only “on the basis of clear and convincing evidence that a mistake in bid was made” and that a unilateral mistake made by the contractor must be “so apparent as to have charged the CO with notice of the probability of the mistake.” *See Dyncorp Int’l LLC*, ASBCA No. 59244, 17-1 BCA ¶ 36,653 at 178,496 (determination by contracting officer under FAR 14.407-4 to rescind or reform contract based upon alleged post-award bid mistake “may be made only on the basis of clear and convincing evidence that a mistake in bid was made”).

BRG offers no evidence that pursuant to FAR 14.407-4(a) modification of the contract to correct the alleged mistake would be favorable to the government. To the contrary, as explained by the SCO, BRG “would not be entitled to price reformation because just modifying the copper price to change it to its Qatar price (even leaving all their other line items at its higher Kuwait price) would have dropped their price rank to 13th and they would not have been in line for award” (SOF ¶ 50). Accordingly, “recession would have been the only option” (*id.*). In its opposition brief, appellant seems to admit as much, stating that “but for the mistake in pricing” BRG “would not have been awarded the contract” (app. opp’n at 4).

Moreover, as discussed above, BRG likewise has failed to present evidence that BRG actually made a mistake in bid, as required by FAR 14.407-4(c). BRG has failed to present sufficient evidence upon which a reasonable factfinder could find the existence of a genuine issue of material fact regarding whether the alleged mistake was so apparent that the SCO should be charged with notice of it pursuant to FAR 14.407-4(c) or why it was incumbent upon the SCO to inform BRG of the difference between its price for copper under its Qatar contract as compared to its bid price for copper

¹³ Part 102-38, of the Federal Management Regulation (FMR), Section 102-38.260 states that “[t]he administrative procedures for handling mistakes in bids are contained in FAR 14.407, Mistakes in Bids (48 CFR 14.407).” *See Lulus Ostrich Ranch*, ASBCA No. 59252 *et al.*, 19-1 BCA ¶ 37,263 at 181,341 (concurrency) (sale of Federal personal property is governed by FMR Part 102-38; section 102-38.260 instructs that “administrative procedures for handling mistakes in bids are contained in FAR 14.407”).

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under the Kuwait IFB. Moreover, as set forth in his declaration, the SCO “did not review BR Group, or any other contractor’s pricing on the Qatar IFB, or any of our other Gulf States offerings on which many of our scrap vendors bid” and “did not have reason to believe a mistake was made” (SOF ¶ 49).

BRG’s Additional Arguments are Unavailing

BRG states that it was awarded the contract based upon “a mistake in bid for the Copper cables and foreign materials and but for this mistake, BR Group would not have been awarded” the contract (app. opp’n at 3) (*see also* app. opp’n at 4 (“but for the mistake in pricing, [BRG] would not have been awarded the contract”). However, BRG then advances a contrary argument, stating that “[b]ut for the Mistake in the Bid made by an accountant for BR Group, who left the company shortly after the bid was submitted, the BR Group *would have performed the contract without any issues*” (app. opp’n at 9) (italics added). BRG’s assertion that it would not have been awarded the contract had it not made a mistake in bid yet would have performed the contract without incident had it not made its alleged mistake in bid is incongruous at best and, as such, unavailing.

Appellant makes a similarly incongruous argument that during a meeting on March 8, 2022, BRG attempted “to give notice to the SCO that the quality and pricing of the copper were [sic] giving them great concern and major losses” and from this concludes that the SCO “had a duty to ask them if they had made a mistake and to inform them of their rights, but instead gave them instructions to file a discrepancy report” (app. opp’n at 8). BRG’s elephant in the room is that BRG fails to explain why it was incumbent upon the SCO to make such an inquiry when BRG’s own employees at the March 2022 meeting, after several months of contract performance, had not realized or otherwise concluded that BRG’s bid included an alleged mistake.

BRG also alleges that on April 19, 2022, the government “had constructive notice” that the “price per pound of \$3.111 was a mistake, and DLA offered the contractor a thirty percent discount which was clearly not enough to correct the pricing mistake” (app. opp’n at 7). BRG’s argument is based upon a complete misstatement of documents in the record. The referenced 30% reduction was based not upon constructive notice of a mistake in bid but upon the government processing BRG’s Reports of Discrepancies (RODs) and granting BRG a 30% reduction regarding the specific scrap identified by BRG in the RODs it submitted to the government (*see* SOF ¶ 23).

The above additional arguments proffered by BRG are neither persuasive nor do they support a finding that genuine issues of material fact exist here so as to

preclude summary judgment for the government on appellant's claim based upon a mistake in bid.

III. The Government's Motion to Dismiss for Lack of Jurisdiction BRG's Challenge to the Government's Termination of the Contract for Default

The government argues that we lack jurisdiction to consider BRG's challenge to the government's termination of the contract for default because it is untimely, noting that the government provided appellant notice of the contract termination on August 16, 2022, and that "any appeal of the termination was required to be sent to the Board by November 14, 2022" (gov't mot. at 15-16) (*see* SOF ¶ 29). The government notes also that BRG submitted its first appeal to the Board on January 16, 2023, five months after the government's termination of BRG's contract (gov't mot. at 16) (*see* SOF ¶¶ 29, 40). In its opposition brief, BRG argues that it "**has successfully plead a claim of wrongful termination . . .**" (app. opp'n at 9) (original quotation in bold).

The CDA grants the Board jurisdiction to consider a contractor's appeal of a contracting officer's decision terminating the contract for default if the appeal is brought within 90 days of the contractor's receipt of the decision. 41 U.S.C. §§ 7104(a), 7105(e)(1). Prior to expiration of the 90-day appeal period, BRG's attorney submitted to the contracting officer a letter dated September 29, 2022, requesting reconsideration of the "termination for default of payment and [submission of] this matter to ADR, as prescribed in the FAR 33.214 Alternative Dispute Resolution" (SOF ¶ 31). BRG's request for reconsideration did not specifically challenge the default termination based upon the SCO's finding that BRG had failed to make the requisite payments, rather, BRG's letter sought an equitable adjustment and reinstatement of the contract based upon an alleged mistake in bid (*id.*).

The SCO, in acknowledging receipt of BRG's September 29, 2022, letter, requested additional information regarding BRG's mistake in bid claim. In so doing, the SCO complied with FAR 14.407-4(e)(1), which requires a contracting officer - for mistakes disclosed after award - to request that the contractor support the alleged mistake in bid by submitting certain additional evidence (SOF ¶ 35). Ultimately, the SCO's October 19, 2022, final decision denying BRG's mistake in bid claim did not address BRG's request for reconsideration of the default termination (SOF ¶ 38). Indeed, the SCO's email accompanying the letter stated that it was a "response to your Alternative Dispute Resolution (ADR) dated 9/29/2022" (*id.*). However, by requesting additional information from the contractor regarding the mistake in bid, the SCO indicated that reconsideration of his final decision was at least a possibility. *Guardian Angels Medical Service Dogs, Inc., v. United States*, 809 F.3d 1244, 1250 (Fed. Cir. 2016) (where contracting officer indicates a willingness to reconsider a final

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decision, such as by asking for more documentation, decision is not final and the time to appeal or file suit does not begin to run until the contracting officer issues reconsideration decision). To the extent BRG's January 16, 2023, appeal sought to challenge the termination for default, it was filed within 90 days of the SCO's October 19, 2022, final decision denying appellant's September 29, 2022, letter requesting contract reinstatement and, therefore, could be considered timely.

However, any such challenge by BRG to the government's default termination is inextricably intertwined with BRG's mistake in bid claim. For example, BRG's January 16, 2023, notice of appeal of the SCO's October 19, 2022, final decision does not set forth a direct challenge to the basis of the government's default termination (SOF ¶ 40). Rather, BRG states that its dispute concerns "[a] mistake in bid price of the contract" and the SCO's rejection of BRG's "request for an equitable adjustment and for an alternative dispute negotiations" (*id.*). The same is true regarding BRG's notice of appeal of the contracting officer's deemed denial of its March 15, 2023, claim (SOF ¶ 44). Indeed, each of the "complaints" submitted by BRG to the Board do not directly challenge the basis of the government's termination for default (failure to reimburse DLA in a timely manner for property BRG purchased under the contract). Rather, the complaints set forth BRG's allegations regarding its mistake in bid claim (SOF ¶¶ 40, 46-47).

Assuming we were to give BRG the benefit of the doubt and treat its opposition brief (claiming it had successfully plead a claim of wrongful termination) as a belated motion to amend its complaint(s) to assert a challenge to the termination for default, our granting a motion to amend would be futile at best. The only basis BRG has to challenge the termination for default is its assertion of a mistake in bid and, as discussed above, we are granting the government's motion for summary judgment on that claim. Because BRG has not made any other allegations that would provide a basis to set aside the default termination, our resolution of the mistake in bid claim is dispositive of its challenge to the default termination.

IV. The Board Lacks Jurisdiction to Direct Specific Performance or Equitable Relief

BRG requests that we direct reinstatement of the contract and allow BRG to "perform and get their expectations damages" (app. opp'n at 10). According to BRG, "[e]xpectation [d]amages are a remedy in breach of contract or wrongful termination of a contract," which appellant suggests is "not outside the jurisdiction of the SCO or the Board of Armed Services for Contract Appeals [sic]" (*id.*). BRG seeks, in essence,

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a form of injunctive relief or specific performance of the contract.¹⁴ In response, the government seeks dismissal of BRG's request for reinstatement, alleging "[i]t is well established that the Board lacks jurisdiction or authority to direct specific performance or equitable relief" (gov't mot. at 24). We agree with the government - the Board lacks jurisdiction to order reinstatement of BRG's contract or to otherwise order specific performance of the contract. *Tex. Eng'g Sols.*, ASBCA Nos. 53669, 54087, 03-2 BCA ¶ 32,272 at 159,660 ("the Board has neither authority nor jurisdiction to order a contract reinstated"); *Erik Robinson d/b/a The Artwork Factory*, ASBCA Nos. 63727, 63809, 24-1 BCA ¶ 38,633 at 187,805 (the Board "indisputably" lacks jurisdiction to entertain a request for specific performance).

V. The Board Lacks Jurisdiction to Consider BRG's Expectation/Lost Profits Claim

In two of its recent filings, BRG asserts additional claims seeking expectation damages, which BRG describes as "expected benefits of the contract and the copper details and the financial damages that the Appellant has endured" (SOF ¶ 46). Included in the computation for these damages is "Profit @25% per year: \$2.8m," and "Profit x 3years = 2.8m x 3 years + \$8.4m" (SOF ¶ 46). The government states that these claims, which the government labels "'lost profit' or 'operating losses' type monetary damages," were never submitted to the contracting officer under the subject contract, and, accordingly, we lack jurisdiction to consider them (gov't mot. at 34-35). We agree.

Pursuant to the CDA, our jurisdiction is "dependent upon the contractor's submission of its claim to the [contracting officer] and a final decision on, or the deemed denial of, the claim." *CCIE & Co.*, ASBCA Nos. 58355, 59008, 14-1 BCA ¶ 35,700 at 174,816 (citing 41 U.S.C. § 7103-7105; *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327-28 (Fed. Cir. 2010). "[W]here there is no claim[,], there can be no effective decision from which to appeal." *Sweet Star Logistic Serv.*, ASBCA No. 62082, 20-1 BCA ¶ 37,704 at 183,045 (quoting *Mawaraa AlBihar Co.*, ASBCA No. 58585, 13-1 BCA ¶ 35,426 at 173,783).

BRG's request for the "expected benefits of the contract and the copper details and the financial damages that the Appellant has endured" are new claims, as they rely upon legal theories and additional facts not presented in BRG's May 16, 2023, claim. Accordingly, we lack jurisdiction to consider them. *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1006-07 (Fed. Cir. 2015). Moreover, even assuming we had

¹⁴ BRG also alleges, without legal citation, that it "is not asking for specific performance but rather for a settlement offer" (app. opp'n at 10).

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jurisdiction to consider these additional claims, the contract expressly limits any remedy to a refund of amounts paid, which would bar appellant's expectation damages claim (SOF ¶¶ 6, 11). The government's motion to dismiss BRG's additional claims is granted.


BRG also makes a passing allegation of unjust enrichment (app. opp'n at 9, 11). BRG alleges that it "received non-conforming materials for the copper cables and all the other materials, which is a breach of the contract that the SCO rejected and did nothing to rectify, even when presented with photos as evidence" (app. opp'n at 1), and that "DLA's neglect of the issues led to the overinflated invoices and BR Group was faced with the Government simply ignoring requests for help" (app. opp'n at 2) (*see also id.* at 6). Neither appellant's September 29, 2022, submission, nor its March 15, 2023, certified claim, contains any allegation that the government breached the contract, as appellant now suggests. Accordingly, we likewise lack jurisdiction to consider these additional claims. The government's motion to dismiss or to strike BRG's expectation/lost profits claim is granted.

CONCLUSION

The Board grants the government's motion for summary judgment regarding BRG's mistake in bid claim and grants the government's motion to dismiss for lack of jurisdiction regarding (1) BRG's request for direct specific performance or equitable relief, and (2) BRG's claim for expectation/lost profits. The appeals are denied.

Dated: November 6, 2024

(Signatures continued)




DAVID B. STINSON
Administrative Judge
Armed Services Board
of Contract Appeals

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I concur



OWEN C. WILSON
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



MICHAEL N. O'CONNELL
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 63507, 63744, Appeals of BR Group, rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals